IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

WEDNESDAY, THE 24TH JANUARY 2007 / 4TH MAGHA 1928

RSA.No. 856 of 2005()

AS.101/2003 of SUB COURT,NEYYATTINKARA
OS.748/2000 of PRL.M.C.,NEYYATTINKARA

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APPELLANT/APPELLANT/DEFENDANT:

N.GANESAN,S/O.NATARAJAN ASSARY,
AGED 41, PROPRIETOR, THIRUVONAM JEWELLERY,
PARASSALA.P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.K.P.SREEKUMAR
SRI.P.M.SATHEESH
SRI.R.GIREESH VARMA

RESPONDENTS: PLAINTIFFS 1 TO 4 AND ADDITIONAL PLAINTIFF NO.5
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1. AMBIKA DEVI, AGED 52 YEARS,
W/O.LATE K.SUKUMARAN NAIR,
RESIDING AT `ANU SADAN', T.C.NO.21/410,
PUTHUMANA LANE, NEDUNCAUD ROAD
KARAMANA.P.O., THIRUVANANTHAPURAM.

2. BINU.A., AGED 31, D/O.AMBIKA DEVI,
IN -DO- -DO-.

3. ANU.A.NAIR,
AGED 29, D/O. -DO- -DO- -DO-.

4. CINU.A.NAIR,
AGED 28, D/0. -DO- -DO- -DO-.

5. K.SADASIVAN, AGED 52,
PROPRIETOR, HOTEL PRASANTH,
PARASSALA.P.O., THIRUVANANTHAPURAM.

R1 TO R4 BY ADV. SRI.N.MAHESH
R5 BY SRI.K.B.PRADEEP

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 16/01/2007, THE COURT ON 24/01/2007 DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J

R.S.A.No.856 OF 2005

Dated this the 24th day of January, 2007

JUDGMENT

1. This second appeal is by the defendant. Four plaintiffs sued contending that they, the widow and children of late Sukumaran Nair, owner of the plaint schedule property, is entitled to evict the defendant and recover arrears of rent, he having been put in possession of the said premises on the basis of Ext.A3 dated 20.1.1997.

2. The appealing defendant contested contending that Sukumaran Nair was a money lender and that the property originally belonged to Rajappan Assari, from whom, the defendant and his brother Suresh purchased it and the defendant later on purchased the share of Suresh also. He went on to contend that he borrowed an amount of Rupees One Lakh from Sukumaran Nair for the purchase of his brother's share and Ext.A1 sale deed in favour of Sukumaran Nair was coupled with a contemporaneous agreement for re-conveyance of the said property.

3. During the proceedings before the trial court, the plaintiffs sold their interest to the third party, who was brought on record as per order dated 2.7.2001 on I.A.No.16/01, as additional 5th plaintiff. The trial court decreed the suit granting the additional 5th plaintiff the right to recover the said property with arrears as found. That has been confirmed in the first appeal. Hence this second appeal by the defendant.

4. Learned counsel for the appellant urged that the courts below had committed a grave error in taking the view that the defendant is not entitled to adduce evidence contrary to the contents of Ext.A1 sale deed by him in favour of Sukumaran Nair and also the terms of Ext.A3. It is pointed out that the sequence of transactions would show that Ext.A1 executed by the defendant in favour of late Sukumaran Nair is not a sale deed and Ext.A3 shown to be an agreement of licence is not to be acted upon. It is further urged that in the absence of the plaintiff tendering oral evidence, the defendant was deprived

of opportunity to cross examine his opponents and therefore, could not bring out the sham nature of the transactions.

5. The execution of Ext.A1 is admitted. That document is an outright sale by the defendant in favour of late Sukumaran Nair. May be that the law prohibits the defendant from bringing in evidence any term in variance of Ext.A1, except in accordance with Section 92 of the Indian Evidence Act, but such inhibition in law would not amount to disabling him from challenging the nature of Ext.A1 and even to contend that it was a sham transaction or that it is not what it is intended to be. But the specific case put forward by the defendant was that contemporaneous with Ext.A1, Sukumaran Nair had executed an agreement in favour of the defendant agreeing to re-convey the said property on repayment of the amount. There is a specific plea to this effect in the written statement. The trial court noticed it. The lower appellate court specifically held, while appreciating the evidence on record, that the agreement stated to have been executed by

Sukumaran Nair in favour of the defendant to re-convey the property has not been produced and there is inconsistency between the contentions raised in the written statement that the alleged agreement to re-convey was contemporaneous on terms that the defendant would repay an amount of Rupees One Lakh and the version of the defendant, while tendering evidence, when he developed a case that the said agreement was returned to Sukumaran Nair. On appreciating the evidence, the trial court came to the conclusion that the version of the defendant is wholly unbelievable. The lower appellate court also took note of the fact that if the case put forward by the defendant were true, there was no reason why Ext.A3 document shown to be an agreement of licence would have been executed by Sukumaran Nair on 20.1.1997, more than one year after Ext.A1 sale deed dated 12.1.1996 was given by the defendant in favour of Sukumaran Nair.

6. Having regard to the aforesaid fact circumstances, there was no reason compelling the plaintiffs to mount the box and

tender oral evidence, particularly when the documentary evidence tendered by them were admitted and marked in evidence with no objections. Those documents are not disputed except to state that Ext.A3 did not contain the signature of late Sukumaran Nair. But that is of no consequence because the document is produced on proper custody, by his widow, and the terms of licence are shown to have been agreed to and signed by the defendant. It is not the defendant's right to make out a ground of non-examination of the plaintiffs in such a case where the materials on record, including the evidence tendered by the defendant, proved the case of the plaintiffs. The appreciation of evidence in this case cannot be termed as faulty, in any manner. It does not warrant interference. At any rate, I am satisfied that the conclusion arrived at by the courts below are just and reasonable and in accordance with law. I, therefore, find no substantial question of law arising for decision in this case.

In the result, the second appeal fails. The same is accordingly dismissed with costs.

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.